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In the Supreme Court of the United States

October, 1982 Term

No. _____

EMMA S. ARMIJO, Personal Representative of the Estate of Annette Armijo, Deceased.

Petitioner,

vs.

MATTHEW A. TANDYSH, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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QUESTION REPRESENTED

Whether the classifications established by the New Mexico Medical Malpractice Act, Sections 41-5-1-28 N.M.S.A. 1978 violate the guarantees of Due Process and Equal Protection of the laws found in the 14th Amendment of the United States Constitution.

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Petitioner,

vs.

MATTHEW A. TANDYSH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

The Petitioner, Emma S. Armijo, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the New Mexico Court of Appeals which was entered September 8 1981, and the quashing of the Writ by the Supreme Court of the State of New Mexico on June 15, 1982.

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OPINION BELOW

The Opinion of the New Mexico Court of Appeals in Armijo v. Tandsh has not yet been reported in New Mexico Reports, though it does appear at 646 P.2d 1034 (Ct. App. 1982). It also appears in the Appendix. The New Mexico Supreme Court's denial of Petitioner's Writ of Certiorari also appears in the Appendix.

JURISDICTION

The Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code, Section 1257 on the grounds that a New Mexico State Statute, as interpreted and justified by the highest Court in New Mexico to render an opinion in this case, is repugnant to the United States Constitution and the rights, privileges and immunities guaranteed to the United States citizens under Federal law. The opinion which Petitioner seeks to have reviewed by this Court was rendered by the New Mexico Court of Appeals, the highest New Mexico Court having jurisdiction over this case to render a decision. The Supreme Court of the State of New Mexico quashed as improvidently granted Petitioner's timely Petition for Writ of Certiorari on June 15, 1982, almost 8 months after it had accepted Certiorari.

QUESTION PRESENTED

Whether the classifications established by the New Mexico Medical Malpractice Act Sections 41-5-1-28 N.M.S.A. 1978 violate the guarantees of Due Process and Equal Protection of the laws found in the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV — Section 1 — United States Constitution

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Emma S. Armijo is a Mexican-American natural mother of decedent residing in Albuquerque, New Mexico. She is serving as the Personal Representative of the Estate of her daughter Annette Armijo, who died on September 3, 1977, at the age of 11. Respondent, Annette's pediatric physician, had diagnosed Annette as a juvenile diabetic on or about July, 1976, and knew that her condition was extremely serious. A few months after this diagnosis Annette developed an abcess between her rectum and vagina caused by an infection. Respondent did not check her blood sugar levels, even though this is a basic, crucial procedure whenever a diabetic undergoes any type of stress or infection. Respondent merely treated the infection. Annette went home, lapsed into a keto acidotic coma that night which lasted almost four months until her death. The New Mexico Medical Review Commission agreed unanimously that Respondent had committed malpractice.

Petitioner as Personal Representative of her daughter's estate filed a complaint against Respondent in the New Mexico District Court for Bernalillo County on August 15, 1980, pursuant to the New Mexico Wrongful Death Act, §§41-2-1 et seq., N.M.S.A. 1978. Her complaint alleged negligence on the part of Respondent which proximately caused the death of her daughter.

Respondent filed a Motion to Dismiss the complaint on September 24, 1980. In his motion, Respondent asserted that Petitioner's claim was barred by the statute of limitations set forth in §41-5-13 N.M.S.A. 1978, which provides that a claim for medical malpractice must be filed within 3 years after the date that the malpractice occurred. Petitioner argued that the appropriate statute of limitations is that of the Wrongful Death Act, §41-2-2 N.M.S.A. 1978, which provides that a claim for wrongful death must be brought within 3 years after the date of the death. The trial court agreed with Respondent that the special statute of limitations set forth in §41-5-13 N.M.S.A. 1978 of the Medical Malpractice Act applied to Petitioner, and dismissed her Complaint on January 5, 1981.

Petitioner filed her Notice of Appeal on January 9, 1981, alleging among other matters that the statute of limitations contained in the New Mexico Medical Malpractice Act, which gives a personal representative of someone who has died as a result of medical malpractice less time to file her suit of

wrongful death than it gives to a personal representative of someone who has died from other negligence, violates the Equal Protection and Due Process clauses of the United States Constitution.

After briefs and oral argument, the New Mexico Court of Appeals affirmed the trial court's dismissal of Petitioner's complaint, holding in its opinion of September 8, 1981 that the Medical Malpractice Act does not violate the Equal Protection and Due Process clauses of the United States Constitution. After Petitioner's Motion for Rehearing in the Court of Appeals was denied, Petitioner filed a Petition for Writ of Certiorari with the New Mexico Supreme Court on October 15, 1981. Although that Court initially issued the Writ on October 22, 1981, it later dismissed it as having been improvidently granted on June 15, 1982, on its own motion.

REASONS FOR GRANTING THE WRIT

The 14th Amendment of the United States Constitution prohibits a state from denying the equal protection of the laws to any person within its jurisdiction. In 1976, the New Mexico Legislature enacted the New Mexico Medical Malpractice Act (Sections 41-5-1-28 N.M.S.A. 1978) in response to a perceived crisis in the health care industry; malpractice insurance premiums were rising, and the legislature feared an exodus of health care providers from the State. A copy of the Act appears in the Appendix.

Whether this crisis ever existed in 1976 is open to serious doubt. For example, in **Arneson v. Olson**, 276 N.W. 2d 125 (N.D. 1978), at 136, the Supreme Court of North Dakota emphasized, in holding North Dakota's Act unconstitutional, that malpractice insurance rates are calculated on a national basis and do not take into account the experience of small states thereby making premiums unjustifiably high. New Mexico like North Dakota is also a small state. It may very well be that New Mexico's legislature could have solved the supposed "malpractice crisis" by requiring insurers to calculate rates on a state rather than national basis. Instead, the legislature enacted ill-conceived panic legislation aimed at lowering malpractice insurance premiums by procedurally thwarting the valid claims of victims of medical malpractice. No attempt was made to reduce this incidence of malpractice

by improving the quality of health-care providers within the State.

The stated purpose of the New Mexico Medical Malpractice Act is "[T]o promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico, §41-5-2 N.M.S.A. 1978. Under the definition section of the Act, (§41-5-3 N.M.S.A. 1978), the Act encompasses all malpractice claims against health care providers, whether based on tort or contract, including claims for battery and wrongful death.

Section 41-5-4 of the Act (§41-5-4 N.M.S.A. 1978) prohibits a dollar demand in a Plaintiff's complaint. The prayer "shall be for such damages as are reasonable."

Section 41-5-5 N.M.S.A. is a crucial section of the Act, setting forth the requirements which must be met for a health care provider to qualify under the Act. A health care provider who does not so qualify is not entitled to the benefits of any of the provisions of the Act.

Section 41-5-6 N.M.S.A. places a maximum limitation of $500,000.00 in damages for any one occurrence unless accrued medical expenses exceed that amount. This limitation applies only to a jury award, (§41-5-6[B] N.M.S.A. 1978), while a judge is allowed to award any amount of damages without limitation. Section 41-5-6(c) of the Act prohibits any monetary damage award for future medical expenses, and Subsection D of Section 41-5-6 limits the personal liability of any health care provider to $100,000.00 with any excess amounts to be paid by a patient's compensation fund.

A special statute of limitations is found in Section 41-5-13 N.M.S.A. 1978. It provides that all malpractice claims must be filed within three years after the date that the alleged malpractice occurred. Except for persons under the age of six, who have until the age of 9 to sue, the subsection "applies to all persons regardless of minority or other legal disability." §41-5-13 N.M.S.A. 1978.

Sections 41-5-14-19 set up a Medical Review Commission which is a panel composed of members of the State Bar and health care providers licensed in New Mexico. The panel hears and reviews all medical malpractice cases involving health care

providers who qualify under the Act. No victim of malpractice can file suit directly in State District Court, Section 41-5-16 N.M.S.A., 1978, but must first obtain a decision by the Commission. However, the decision of the Commissional is not binding, (§41-5-20(F) N.M.S.A. 1978), and is not admissible in evidence at any subsequent trial, (§41-5-20(D) N.M.S.A. 1978).

In return for the delay and expense incurred by a malpractice victim in having to go to a panel hearing Section 41-5-23 N.M.S.A. provides that, where the panel decides favorably for the victim, the panel and everyone involved will "cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient." This section does not require the Commission to provide a malpractice victim with an expert. Nor does it empower the Commission to compel a qualified expert to testify on behalf of a victim. All it does is promise to try to help the victim find any expert, something the victim was probably capable of doing anyway.

Section 41-5-25 N.M.S.A. 1978 sets up a Patient Compensation Fund, whereby each health care provider pays its insurer a surcharge in addition to its normal liability insurance premiums of up to one-third. This surcharge is turned over to the fund superintendent for management and investment, to be used to pay malpractice awards against fund members which exceed $100,000.00

This, then, is the basic statutory scheme embodied in the New Mexico Medical Malpractice Act of 1976. The scheme's basic idea is to protect its members from the full effects of their own malpractice by reducing the rights of their victims to recover for their injuries. It singles out victims of malpracticing health care providers who qualify under the Act, and limits the rights of such victims as compared to the rights of all other tort victims. As such, the Act violates the Equal Protection and Due Process clauses of the United States Constitution.

The right to recover damages for personal injury is not a fundamental right, **Brown v. Merlo**, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), and there is no suspect classification based on race, alienage, or nationality in this case. Nevertheless, this

right to recover damages for personal injuries is a very important one, and the Supreme Court of New Hampshire has stated that the right is "sufficiently important to require that the restrictions imposed on those rights be subjected to more vigorous judicial scrutiny than allowed under the rational basis test," **Carson v. Maurer**, 424 A.2d 825 (N.H. 1980). Another state court has followed the rational relationship test, **"American Bank and Trust Co., v. Community Hospital of Los Gatos,"** 163 Cal. Rptr. 513, 104 Cal. App. 3d 219 (1980), at 517. Yet regardless of which level of scrutiny is applied to this important right in this case, the New Mexico Medical Malpractice Act does not pass Constitutional muster. The provisions and classifications of the Act are arbitrary and unreasonable. They do not rest upon a ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated are treated alike, **Reed v. Reed**, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed. 2d. 225 (1971).

Section 41-5-13 N.M.S.A. 1978 is a special statute of limitations embodied in the Medical Malpractice Act. All actions for medical malpractice must be brought within three years after the date on which the malpractice occurred. Petitioner's complaint was dismissed for failure to comply with this section of the act, since the action was not filed within three years. However, if this special statute applicable only to medical malpractice claims did not exist, Petitioner's suit would have been governed by the New Mexico Wrongful Death Act, Sections 41-2-1-4 N.M.S.A. 1978, and Petitioner's suit would have been timely filed. §41-2-2 N.M.S.A. 1978 allows suits within three years after the wrongful death; here, Annette died on September 13, 1977 and suit was filed on August 5, 1980.

Section 41-5-13 therefore classifies victims of medical torts differently than victims of all other torts, and the estates of persons killed through medical negligence are accorded fewer rights than those of persons killed by non-medical torts. This classification does nothing to promote the health and welfare of the people of New Mexico, which under Section 41-5-2 N.M.S.A. is the purported purpose of the Act. Instead, this discriminatory statute of limitations serves only to insulate health care providers from valid and legitimate malpractice

claims, while doing nothing to reduce the incidence of malpractice itself.

In addition, the statute is not even substantially related to the reduction of medical insurance premiums, since by the terms of Section 41-5-5(B) N.M.S.A. 1978, the provisions of the Act apply only to health care providers who qualify under Subsection (A) of Section 41-5-5 N.M.S.A. 1978. Therefore, the right to sue a health care provider for death caused by malpractice depends arbitrarily on whether the health care provider has qualified for the benefits of the Act. If it has, then suit must be brought within the limits of Section 41-5-13 N.M.S.A. 1978; but if the health care provider has not qualified, then the Plaintiff may sue until 3 years after the death. The Act therefore is only partly related to the goal of reducing malpractice insurance premiums since nothing in the Act requires a health care provider to become qualified under Section 41-5-5 N.M.S.A. 1978, and the way in which the Act does in part further the statutory purpose by protecting qualified health care providers is arbitrary, unreasonable, and grossly unjust. It serves only to insulate a select group of negligent health care providers from liability by depriving the victim's estate of its right to sue. By enacting this statute, the New Mexico Legislature, encouraged by the medical and insurance lobbies has sought to "escape its responsibility to provide justice by simply eliminating the rights of its citizens" **Carson v. Maurer**, 424 A.2d 825, at 838 (N.H. 1980).

Section 41-5-13 N.M.S.A. 1978 also provides (except for children under six who have until their ninth birthday), that its three year limitation "applies to all persons regardless of minority or other legal disability." The general rule in New Mexico is that statutes of limitation are tolled by minority or other legal disability under Section 37-1-10 N.M.S.A. 1978, which provides that minors and incapacitated persons shall have one year to bring an action (including a personal injury action) after the disability has been removed.

Therefore, under the Medical Malpractice Act, children and incompetent victims who are victims of medical malpractice by "qualified" health care providers are accorded different and inferior rights than those given to all other children and incompetents in New Mexico. This classification is not substantially related to furthering the statutory purpose of

promoting the health and welfare of the citizens of New Mexico. It is simply another means by which the insurance industry has sought to insulate itself from the payment of valid claims. The New Hampshire statute declared unconstitutional in **Carson v. Maurer, supra,** had an almost identical provision. The Court there held that statute to violate the Equal Protection clause since only a relatively small number of malpractice claims are brought by such persons, and therefore such a provision does not substantially further the cost-containment purposes of the statute. New Mexico's statute violates Equal Protection for the same reason.

Under Section 41-5-13 N.M.S.A. 1978, a child who is under the age of six when injured by malpractice has until his ninth birthday to file suit. Therefore, a child injured at the age of one year has eight years in which to sue, while a child injured at the age of six has only three years to sue. Unless it can be argued that there is a dramatic increase in malpractice claims on behalf of children under six years and older, (which is patently absurd), then the conclusion that this classification is arbitrary and devoid of any relationship whatsoever to the statutory purpose is inescapable.

Section 41-5-6 N.M.S.A. 1978 limits recovery from malpractice to $500,000.00 unless accrued medical expenses exceed that amount. Several other state courts have found such limits on recovery to violate Equal Protection on the grounds that such a limit is arbitrary and unreasonable. See, e.g. **Simon v. St. Elizabeth Medical Center,** 355 N.E. 2d. 903 at 910 (Ohio Ct. Common Pleas 1976), which had a $200,000.00 limit, **Wright v. Central Du Page Hospital Association,** 347 N.E. 2d. 736 at 742 (Ill. 1976), ($500,000.00 limit), and **Arneson v. Olson, supra,** at 136 ($500,000.00 limit).

New Mexico's $500,000.00 damage limitation is also arbitrary and unreasonable. It destroys the right of those most seriously harmed by denying them adequate compensation, even through the number of victims with such claims must be only a small percentage of malpractice victims. Rights are arbitrarily destroyed, even though the destruction thereof is only slightly related, if at all, to the cost-containment purpose of the Act. No other New Mexico statute limits damages; victims of medical malpractice are singled out for dis-

criminatory treatment by the Act.

In addition to the discriminatory nature of this statute, it is totally unnecessary. As pointed out by the Court in **Carson, supra,** at 837, if there is an excessive verdict, remittitur is always available. The same is true in New Mexico.

The argument is often made that this limitation is justified because it reduces the cost of medical care to all members of society. This is the so called "quid pro quo" argument which was rejected in **Simon, supra,** at 910, where the Court reasoned that there is no quid pro quo where some give up their right to damages so that all may have cheaper medical care, because the seriously injured give us so much and gain nothing. The same is true in New Mexico, where this limitation seeks to disproportionately heap the responsibility for keeping medical costs down onto the backs of those who have been most grievously injured.

It should also be noted that this limitation imposed by Section 41-5-6 N.M.S.A. 1978 applies only to jury verdicts. A judge can grant damages without limitation. This classification is blatantly arbitrary and does nothing to substantially further the cost-containment goals of the Act. Instead, it simply reflects a mistrust of juries on the part of the insurance industry which ignores the existence of remittitur procedures. Under the Act, a victim's right to full compensation depends on the arbitrary circumstances of whether the case is tried to a judge or a jury.

The New Mexico Medical Malpractice Act is a classic example of special legislation drafted in panic to protect a particular group. The rights of victims of medical malpractice by "qualified" health care providers are less than those of all other tort victims. Even among victims of "qualified" health care providers, rights vary depending on arbitrary factors such as age of the victim, how badly the victim is injured, and whether the case is tried before a judge or a jury. This Act ignores the very existence of the Equal Protection clause and must not be allowed to stand.

CONCLUSION

For all of the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the New Mexico Court of Appeals.

RESPECTFULLY SUBMITTED,
ALFRED M. CARVAJAL, P.A.

By Alfred M. Carvajal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the New Mexico Court of Appeals, was mailed to counsel for Respondent this 14th day of September, 1982.

Alfred M. Carvajal
ALFRED M. CARVAJAL